(25,037)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 754.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ALVIN J. FINK.

IN ERROR TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, STATE OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1916.

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1 In the Supreme Court of the United States of America.

No. —.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,

vs.

ALVIN J. FINK, Defendant in Error.

Writ of Error from the Supreme Court of the United States of America to the Court of Appeals of Montgomery County, Ohio.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals, Montgomery County, Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Montgomery County, Ohio, before you, being the highest Court of Law or Equity of said State, in which a decision could be had in said suit between The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and Alvin J. Fink, wherein was drawn in question the construction of a statute of the United States and the decision was against the title and right, especially set up or claimed under such statute; a manifest error hath happened to the great damage of said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company as by its complaint appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date
2 hereof, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States the 16th day of November, in the Year of our Lord, one thousand nine hundred and fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY, *Justice.*

3 In the Supreme Court of the United States of America.

No. —.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Assignment of Error.

And now, before the Justices of the Supreme Court of the United States of America, at the Capital, in the City of Washington, comes The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error by its counsel, in the above stated case, and, assigning error therein says: that in the record and proceedings in the aforesaid cause there is manifest error in this, towit:

The Court of Appeals of Montgomery County, Ohio, erred in adjudging and deciding that the Common Pleas Court of Montgomery County, Ohio, erred in reversing and in not affirming the judgment of the Justice of the Peace, rendered herein, for the reason as assigned by said Court of Appeals, that the plaintiff as consignee of goods shipped in Interstate Commerce, but not being a party to the contract of shipment nor the owner of the goods in transit and having acquired the goods and parted with full consideration upon the faith of the freight charges actually made by the carrier, is not liable for increased freight charges due to a misquotation by the carrier of the true published tariff rate.

Plaintiff in error says that said judgment complained of, is repugnant to and in conflict with the laws of the United States, and especially the Act of Congress to regulate commerce, com-
4 monly called "The Interstate Commerce Act," and approved February 4, 1887 and the Acts amendatory thereof, and supplementary thereto, and denies the plaintiff in error a right and privilege created under the Constitution of the United States and the said Acts of Congress.

EDWIN P. MATTHEWS,
WILLIAM M. MATTHEWS,
Attorneys and of Counsel for Plaintiff in Error.

5 In the Supreme Court of the United States of America.

No. —.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,

vs.

ALVIN J. FINK, Defendant in Error.

Petition for a Writ of Error from the Supreme Court of the United States of America to the Court of Appeals of Montgomery County, Ohio.

The petition of The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, by Edwin P. Matthews, and William M. Matthews, its Attorneys, hereby sets forth that on or about the 15th day of July, 1914, the Court of Appeals of Montgomery County, Ohio, made and entered a final order and judgment herein, in favor of the defendant in error, in which final order and judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff in error, all of which will, more in detail, appear from the assignment of errors, which we file with this petition.

Said petitioner, the said plaintiff in error, says that the Constitution and laws of the State of Ohio provide as set forth in said Constitution in Article IV and Section 6, that judgments of the Court of Appeals, of Ohio, shall be final in all cases, except cases involving questions arising under the Constitution of the United States and of this State, cases of felony, cases over which it has original jurisdiction, and cases of public or great general interest, in which the Supreme Court of Ohio may direct any Court of Appeals of Ohio, to certify its record to that Court. A motion was
6 duly filed by the petitioner herein subsequent to the rendition of the judgment and final order herein complained of, in the Supreme Court of Ohio for an order to the Court of Appeals of Montgomery County, Ohio, to certify the record in this cause to said Supreme Court for review, and that on the 18th day of November, 1914, said Supreme Court entered an order overruling said motion, and your petitioner says that the Court of Appeals of Montgomery County, Ohio, is the highest Court in said State of Ohio, in which a decision could be had in this matter and cause.

Upon said trial and said subsequent proceedings which were had in the Court of Appeals of Montgomery County, Ohio, and in the Supreme Court of Ohio, your petitioner duly argued and insisted that a judgment be rendered for the plaintiff in error and against the defendant in error, because it was entitled to such judgment under and by virtue of "An Act to Regulate Commerce," commonly called the "Interstate Commerce Act", approved February 4, 1887, and the Acts Amendatory thereof and supplementary thereto, and your petitioner duly excepted to the aforesaid final order and judg-

ment. Said decisions of said Courts and each of them denied to your petitioner, the title, right, privilege and immunity held by your petitioner under the Constitution and Statutes of the United States of America.

Wherefore, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, petitions and prays that a Writ of Error from the Supreme Court of the United States issue in its behalf, to the Court of Appeals of Montgomery County, Ohio, for the correction of errors, so complained of, and that a transcript
7 of the record, proceedings and papers in said cause duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 16th day of November, A. D. 1915.

EDWIN P. MATTHEWS,
WILLIAM M. MATTHEWS,
Attorneys for the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

November 16, 1915.
Let the Writ issue as prayed for.
WILLIAM R. DAY, *Justice.*

8 In the Court of Appeals, Montgomery County, Ohio.

No. 31.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Præcipe.

To J. Clarence Schaeffer, Clerk of the Court of Appeals, Montgomery County, Ohio:

In accordance with the Writ of Error heretofore filed with you, please prepare, after ten days from the date hereof, unless an objection is filed by the defendant in error within said time, the complete record of the proceedings heretofore had in this cause, including a transcript of the docket and Journal entries in the Courts of Common Pleas and in the Court of Appeals, with the Bill of Exceptions and pleadings, and all other original papers and send the same to the Clerk of the Supreme Court of the United States of America, according to the command of said Writ of Error.

MATTHEWS & MATTHEWS,
Attorneys for Plaintiff in Error.

STATE OF OHIO,
Montgomery County, ss:

William M. Matthews being first duly sworn deposes and says that he served the counsel of the defendant in error with a true copy of

the foregoing præcipe by handing a true copy of the same to Roy G. Fitzgerald.

WILLIAM M. MATTHEWS.

9 Sworn to and subscribed by William M. Matthews before me and in my presence this 18th day of November, 1915.

[Notarial Seal, Montgomery County, Ohio.]

L. ROY EBERT,
Notary Public in and for Montgomery County, Ohio.

10 In the Supreme Court of the United States of America.

No. —.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Alvin J. Fink, Dayton, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of Montgomery County, Ohio, wherein The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 16 day of November, in the Year of our Lord, one thousand nine hundred and fifteen.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

10½ STATE OF OHIO,
Montgomery County, ss:

William M. Matthews being first duly sworn, deposes and says that he served a true copy of the within citation upon Alvin J. Fink by handing said copy to him on the 17th day of November, A. D. — at 3:45 o'clock P. M.

WILLIAM M. MATTHEWS.

Sworn to and subscribed by William M. Matthews, before me and in my presence this 18th day of November, 1915.

[Notarial Seal, Montgomery County, Ohio.]

L. ROY EBERT,
Notary Public in and for Montgomery County, Ohio.

11 Supreme Court of the United States.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Bond.

Know all men by these presents that The Pittsburgh, Cincinnati, Chicago, and St. Louis Railway Company, as principal, and The United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto Alvin J. Fink, the defendant in error, in the sum of One Thousand Dollars to be paid to said obligee, his successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of November, A. D. 1915.

Whereas the above named plaintiff in error hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the court of Appals of Montgomery County, Ohio.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
By MATTHEWS & MATTHEWS, *Solicitors.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND,
By WM. R. SWORNSTEAD,
Attorney in Fact.

Signed, sealed and delivered in the presence of:
M. A. HARDY.
CHAS. W. LAWTON.

I hereby approve the foregoing bond and surety this sixteenth day of November, A. D. 1915.

WILLIAM R. DAY, *Justice.*

12 #14740.

STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1914, Towit: Tuesday, Nov. 10th.

#8598.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RY. CO.
vs.
ALVIN J. FINK.

Motion for an Order Directing the Court of Appeals of Montgomery County to Certify Its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.
(Costs—Motion $2.00 pd. by Matthews & M.)

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 26, Page 579.
In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 17th day of November, A. D. 1914.
[SEAL.]

FRANK E. McKEAN, *Clerk.*
SEBOT H. MILLER, *Deputy.*

13 THE STATE OF OHIO,
Montgomery County, ss:

I, J. Clarence Schaeffer, Clerk of the Court of Appeals, within and for the County and State aforesaid, do hereby certify that the foregoing is a true and correct copy of the original petition on file in this office.
Witness, my hand and affixed the seal of said Court, at the City of Dayton, Ohio, this 9 day of Nov. A. D., 1915.

[Seal The Court of Appeals of Ohio, Montgomery County.]

J. CLARENCE SCHAEFFER,
Clerk of the Court of Appeals, Montgomery Co., O.
——— ———, *Deputy.*

[United States internal revenue documentary stamp, series of 1914, ten cents. Filed Nov. 9, '15. J. C. Schaffer, Clerk.]

14 Court of Appeals, Montgomery County, Ohio.

No. 31.

ALVIN J. FINK, Plaintiff in Error,
vs.
THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant in Error.

Petition in Error.

Plaintiff in error says that at the October Term, 1913 of the Court of Common Pleas of Montgomery County, Ohio, the defendant in error recovered a judgment against him in the sum of $15.00 and interest and costs in an action pending in said Court of Common Pleas on error to the Court of C. D. Thompson, Justice of the Peace, in which error proceeding this defendant in error was plaintiff in error and this plaintiff in error was defendant in error, a transcript of the docket and journal entries in said case and of said judgment and all the original papers are filed herewith.

There is error in the record prejudicial to the plaintiff in error in this to wit:

1. The Common Pleas Court erred in entering a judgment in the error proceedings against said Alvin J. Fink upon an action at law without the intervention of a jury.
2. The said Court erred in reversing the judgment of the justice of the peace upon the verdict of a jury.
3. The said Court erred in not affirming the judgment of the trial court.
4. There are other errors apparent upon an inspection of the record.

Wherefore, this plaintiff in error prays that the judgment of the Court of Common Please be reversed and that of the Justice of the Peace affirmed and that plaintiff may be restored to all things that he has lost by reason of said erroneous judgment.

ROY G. FITZGERALD,
Attorney for Plaintiff in Error.

Waiver.

Issue and service of summons is hereby waived and the appearance of The Pittsburgh, Cleveland, Chicago and St. Louis Railway Company entered as defendant in error.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
By MATTHEWS, & MATTHEWS,
Attorneys of Record for Defendant in Error.

15 Court of Appeals, Montgomery County, Ohio.

ALVIN J. FINK, Plaintiff in Error,
vs.
THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO., Defendant in Error.

Error.

Roy Fitzgerald.
Matthews & Matthews.

Dec. 9, 1913. Petition in error, transcript, of Docket and Journal Entries, seven original papers and Bill of Exceptions filed.
Dec. 16, 1913. Brief for plaintiff in error filed.
July 15, 1914. Judgment of Common Pleas Court reversed. Plaintiff in error to recover costs. M-1, P-135.

"ENTRY."—This day this cause came on to be heard upon the petition in error, the original papers and a transcript of the docket and journal entries, was argued by counsel and submitted to the court, whereupon the court being fully advised finds that there is error in the record in this, towit; that the common pleas court erred in reversing and in not affirming the judgment of the Justice of the Peace for the reason that the plaintiff as consignee of goods shipped in interstate commerce, but not being a party to the contract of shipment nor the owner of the goods in transit and having acquired the goods and parted with full consideration upon the faith of the freight charges actually made by the carrier, is not liable for increased freight charges due to a misquotation by the carrier of the true published tariff rate.

It is therefore ordered, adjudged and decreed by the Court that the judgment of the court of common pleas be and the same hereby is reversed and that the judgment of the justice of the peace
16 be and the same is hereby affirmed, and that plaintiff in error recover from defendant in error his costs herein taxed at $— to all of which the defendant excepted. And there appearing to have been a reasonable ground for this proceeding in error no penalty is awarded. A special mandate is ordered sent to the Common Pleas to carry this judgment into effect.

App'd.

ALLREAD, *Judge.*

17 THE STATE OF OHIO,
Montgomery County, ss:

I, J. Clarence Schaeffer, Clerk of the Court of Appeals, within and for the County and State aforesaid, do hereby certify that the foregoing is a true and correct transcript of the docket and journal entries in Case No. 31.

Witness my hand and seal of said Court, at the City of Dayton, this 8th day of Sept, A. D., 1914.

[Seal The Court of Appeals of Ohio, Montgomery County.]

J. CLARENCE SCHAEFFER,
Clerk of the of Common Pleas Court, *Montgomery Co., O.*
H. B. SOLIMANO, *Deputy.*

18 Court of Common Pleas of Montgomery County, Ohio.

No. 34023.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Petition in Error.

Plaintiff in error, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, says that on the 13th day of March, 1912, before C. D. Thompson, Justice of the Peace, the defendant in error, Alvin J. Fink, recovered a judgment against the plaintiff in error by the consideration of said Justice of the Peace in a certain case then pending before him, wherein the plaintiff in error was the plaintiff and the defendant in error was the defendant. A transcript of the Docket entries thereof, together with the bill of exceptions and the original papers in said case, are filed herewith.

There is error in said record and proceeding to the prejudice of the plaintiff in error in the following particulars:

First. Said Justice of the Peace erred in overruling the motion of the plaintiff in error for a new trial.

Second. Said Justice of the Peace erred in refusing to give the charge as required by plaintiff in error and in refusing to give the same before argument of Counsel.

Third. The said Justice of the Peace erred in the admission of evidence offered by the defendant in error, to which the plaintiff in error objected.

Fourth. The verdict of the jury is against the clear weight of the evidence and contrary to law.

Fifth. Other errors appearing upon the record to the prejudice of the plaintiff below.

Plaintiff in error therefore prays that the said judgment may be reversed, and that it may be restored to all things it has lost by reason thereof, and that this Court will render the judgment that should have been rendered below.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff in Error.

19 *Waiver.*

The issue and service of summons upon the foregoing petition in error is hereby waived and the appearance of the defendant in error entered thereto, this March 22nd, 1912.

ROY G. FITZGERALD,
As Attorney of Record for Alvin J. Fink.

20 Common Pleas Court, Montgomery County, Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
ALVIN J. FINK, Defendant in Error.

Error.

Matthews & Matthews.

Mar. 22, 1912. Petition in error. Bill of Exceptions and eight original papers from the docket of the C. D. Thompson, J. P., filed.

Mar. 22, 1912. Waiver of summons in error and appearance entered by Roy G. Fitzgerald attorney of record for Alvin J. Fink.

Nov. 5, 1913. Judg. reversed. Pl't'ff in error to recover $15.00 with 6% interest and costs. M-68-P-47.

"ENTRY."—This cause coming on to be heard upon the petition in error, the transcript and the original papers and pleadings from the court of C. D. Thompson, Justice of the Peace, Dayton Township, Montgomery County, Ohio, and was argued by Counsel; on consideration thereof, the court find that there is error apparent on the record of said proceedings and judgment. It is therefore considered by the court that the judgment aforesaid be, and the same is hereby reversed and the plaintiff in error recover from the defendant, in error, the sum of Fifteen Dollars, ($15.00) with interest at six per cent per annum from the — day of ——, 1911, and its costs herein expended, taxed at $—, and execution is awarded therefor as well as for the costs herein. To which ruling and judgment of the court especially without the intervention of a jury the defendant in error excepts.

Approved:

SNEDIKER, *Judge.*

21 THE STATE OF OHIO,
Montgomery County, ss:

I, J. Clarence Schaeffer, Clerk of the Common Pleas Court, within and for the County and State aforesaid, do hereby certify that the

foregoing is a true and correct transcript of the docket and journal entries in Case No. 34023.

Witness my hand and seal of said Court, at the City of Dayton, this 8th day of Sept., A. D. 1914.

[Seal Common Pleas Court of the County of Montgomery Ohio.]

J. CLARENCE SCHAEFFER,
Clerk of the Common Pleas Court, Montgomery Co., O.
H. B. SOLIMANO, *Deputy.*

22 Civil Action.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff,
vs.
ALVIN FINKE, Defendant.

Before C. D. Thompson, J. P., of Dayton Township, Montgomery County, State of Ohio, February 27, 1912.

The plaintiff filed Bill of Particulars in substance as follows:

Now comes plaintiff and says that defendant is indebted to it and its connecting carriers in the sum of Fifteen ($15.00) Dollars on a contract to transport certain freight subject to the lawful tariff rates.

Wherefore plaintiff prays judgment against the defendant in the sum of Fifteen ($15.00) Dollars and costs of this action.

Amended Bill of Particulars filed March 12, 1912.

Now comes plaintiff and says that it is a common carrier and that defendant is indebted to it in the sum of Fifteen ($15.00) Dollars for the carriage and conveyance of certain merchandise by plaintiff, which was conveyed and delivered to defendant at his request, on or about August 21, 1910.

Wherefore, plaintiff prays judgment against defendant in said sum of Fifteen ($15.00) Dollars with costs of this action.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff.

Feb. 28, 1912. Summons issued to S. C. Ward, Constable, returnable March 6th, 1912; at 2 p. m. returned, endorsed: Received this writ Feb. 28th, 1912, and Feb. 29th, 1912, served the same on defendant by leaving certified copy thereof and of the endorsements thereon with him personally. S. C. Ward, Constable.

March 6, 1912, Case continued to March 13, 1912 at 2 p. m.

March 6, 1912, Summons for Jury issued to S. C. Ward, Constable for the following Jorors: G. H. Focht, John Kiester, E. J. Farrell, D. C. Woolport W. C. Vlerebone and Wm. Haller, Sr.

March 13, 1912, D. C. Woolport, E. J. Farrell, G. H. Focht, W. C. Vlerebone, Wm. Haller, Sr., and John Kiester sworn and impaneled as Jurors.

March 13, 1912, Parties present, trial had, Siloin Simon sworn and examined for plaintiff.

Alvin Finke sworn and examined for defendant.

The Jury having heard the proof an- allegations of both
23 parties agreed upon and returned their verdict this day as follows:

We the Jury do find for the defendant.

D. C. WOOLPORT, *Foreman.*

March 13, 1912, Now comes the plaintiff and moves that it be granted a new trial for the following reasons:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to law.
3. For error in refusing to give the special charge requested before argument.
4. For error in the charge of the Court; and
5. For various errors occurring at the trial.
6. Because the verdict is not sustained by sufficient evidence.

MATTHEWS, JAMES & MATTHEWS.
Att'y- for Plaintiff.

March 14, 1912. Motion for new trial overruled to which finding and ruling of the Court the plaintiff by its Att'y excepts.

It is therefore ordered and adjudged by me that the plaintiff hath no cause of action herein.

Defendant to recover from the plaintiff the costs of this action taxed at $9.35 to which finding and ruling of the Court the plaintiff by its Att'y excepts.

March 20, 1912. Bill of Exceptions filed by Plaintiff, same submitted to counsel.

March 22nd, 1912, Bill of Exceptions, Transcript of Docket, Entries and original paper transmitted to the Clerk of Common Pleas Court.

Certificate.

THE STATE OF OHIO,
Montgomery County, Dayton Township, ss:

I do hereby certify that the within is a full and true copy from my docket, of the proceedings had by and before me, at my office in said Township in the above action.

C. D. THOMPSON,
J. P. of the Aforesaid Township.

24 Before C. D. Thompson, Justice of the Peace in and for Dayton Township, Montgomery County, Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff,

vs.

ALVIN FINKE, Defendant.

Bill of Particulars.

Now comes plaintiff and says that defendant is indebted to it and its connecting carriers in the sum of Fifteen ($15.00) Dollars on a contract to transport certain freight subject to the lawful tariff rates.

Wherefore, plaintiff prays judgment against the defendant in the sum of Fifteen ($15.00) Dollars, and costs of this action.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff.

25 Before C. D. Thompson, Justice of the Peace in and for Dayton Township, Montgomery County, Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff,

vs.

ALVIN J. FINK, Defendant.

Amended Bill of Particulars.

Now comes plaintiff and says that it is a common carrier, and that defendant is indebted to it in the sum of Fifteen ($15.00) Dollars for the carriage and conveyance of certain merchandise by plaintiff, which was conveyed and delivered to defendant, at his request, on or about August 21st, 1910.

Wherefore plaintiff prays judgment against defendant in said sum of Fifteen ($15.00) Dollars, with costs of this action.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff.

26 Before C. D. Thompson, Justice of the Peace within and for Dayton Township, Montgomery County, Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff,

vs.

ALVIN J. FINKE, Defendant.

Motion for New Trial.

Now comes the plaintiff and moves that it be granted a new trial for the following reasons:

1. That the verdict is contrary to the evidence;
2. That the verdict is contrary to law.
3. For error in refusing to give the special charge requested before argument.
4. For error in the charge of the Court; and
5. For various errors occurring at the trial.
6. Because the verdict is not sustained by sufficient evidence.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff.

27 Before C. D. Thompson, Justice of the Peace within and for Dayton Township Montgomery County, Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff,
vs.
ALVIN J. FINK, Defendant.

Testimony of Sylvan Simonton and Alvin J. Fink.

William M. Matthews, Attorney for Plaintiff.
Roy G. Fitzgerald, Attorney for Defendant.

28 Be it remembered that this cause came on to be heard on the 13th day of March, 1912, before Honorable C. D. Thompson, a Justice of the Peace in and for Dayton Township, Montgomery County, Ohio, and a Jury, and thereupon, the Jury having been duly impaneled and sworn, the plaintiff, to maintain the issues on its part to be maintained, offered the following evidence:

29 SYLVAN SIMONTON, being duly sworn, testified as follows:

Direct examination.

By Mr. Matthews:

Q. Please state your name?
A. My name is Sylvan Simonton.
Q. What is your business Mr. Simonton?
A. Freight Cashier of The P. C. C. & St. L. Ry. Company in the City of Dayton, Ohio.
Q. How long have you been in that position?
A. Since October 1902.
Q. Then you held that position in August 1911?
A. Yes.
Q. Did you receive a shipment of goods consigned to Alvin J. Fink about that time?
A. Yes.
Q. I will hand you this paper and ask you to identify it?
A. That is the drayman's receipt for the goods delivered by us to the drayman to be delivered by him to Mr. Finke.

Q. What does that receipt show?

A. That he collected fifteen dollars on the goods delivered.

30 Q. Of what did this shipment consist?

A. Well I am unable to say what it consisted of. There were two boxes of curios.

Q. How was it billed?

A. Two boxes of Indian Curios.

Q. At how much?

A. 500 pounds, at $3.00 per hundred, making $15.00 from Los Angeles, California.

Q. By Mr. Matthews: This identified receipt offered in evidence, marked "Exhibit A" attached hereto and made part hereof.

Q. From your tariff sheets what do you find in reference to curios?

A. This shipment was governed by western classification No. 48, page 57, item 29, which names double first class rate on curios consisting of Indian Pottery, Bead Work, Prehistoric Implements, Images, Chinese and Japanese Curios. The first class rate is $3.00 per hundred weight, and the double first class rate would be $6.00 per hundred.

Q. How much did you receive from the defendant on this shipment?

A. Fifteen dollars, it was billed at first class rate.

Q. How much should you have received.

A. Thirty dollars.

31 Q. To whom were these goods consigned?

A. To Alvin J. Fink.

Q. Did you have the bill of lading surrendered to you?

A. No.

Q. Why not?

A. The drayman knew Mr. Fink and we knew him, and it is not customary to have the consignee surrender the bill of lading unless it is an order shipment.

Q. What is the difference between this shipment and an order shipment?

A. A shipment of this kind is billed straight from the consignor to the consignee and the goods are delivered direct to the consignee, and an order shipment is billed notify consignee, and in that case we draw on them through the bank for the goods.

Cross-examination.

By Mr. Fitzgerald:

Q. This receipt, Mr. Simonton, which has been introduced in evidence, is a receipt supposed to be given the railroad company. It is signed by—what is the name?

A. Ora Snyder, the drayman. That is the receipt we take when we deliver the goods.

Q. And where is the receipt for the fifteen dollars?

A. Mr. Fink has that.

32 Q. I will pass that to you Mr. Simonton and ask you to tell the Jury what it is.

A. It is the receipt for the money collected on the shipment.

Q. Please read the receipt and see if there is any intimation of a partial payment.

A. Two boxes of Indian Curios, 500 pounds, rate $3.00, Fifteen dollars.

Q. What was the amount to be collected from Mr. Fink when the boxes were turned over to him, according to your information?

A. According to the bill it was $15.00.

Q. And you collected fifteen dollars and turned the stuff over to Mr. Fink?

A. Yes.

Q. Who shipped this stuff?

A. I don't know.

Q. Who took the order?

A. It was taken at Los Angeles, California.

Q. Was there any deceit on the part of the consignor? Did he give any false description of the goods?

A. I cannot say as to that.

Q. From the receipt, what does it indicate? I mean did he give any description that would indicate that he attempted to deceive the railroad company, as something requiring a lower rate?

A. No sir.

33 Q. Who made the mistake?

A. The Clerk at Los Angeles.

Q. Who did he contract with to ship this freight. Who made the arrangement to ship it?

A. I am unable to say who the shipper was.

Q. You have no information as to that?

A. No.

Q. You do know the consignee, the person to whom it was shipped?

A. Yes, Mr. Alvin J. Fink.

Q. How long afterward Mr. Simonton, can you tell, before you attempted to collect any further money from Mr. Fink?

A. I think it was about, well, pretty near a year.

Q. About a year afterward you presented a bill to Mr. Fink for $15.00 more?

A. Yes.

Q. Did you see him personally?

A. The first time I did not.

Q. But you have since?

A. Yes.

Q. Did he explain to you the circumstances under which he had gotten these things?

A. He did not, but he said he had some trouble with the shipper.

Q. Did he tell you that he would not be able to get any-

34 thing from him for this?

A. He said he had no recourse.

Q. And did he also tell you at that time, that all this stuff had been sold and separated and scattered?

A. Well, he said some of it had been disposed of.

Q. That it had been broken up and it would be impossible to collect it together again? From your own observation, it would be scattered?

A. I suppose it would be.

Q. These quoted rates from which you have read and the classification from which you have read are established and reported to whom?

A. They are exact copies of classification and rates filed with the Interstate Commerce Commission.

Q. So that the rates to all persons shall be uniform?

A. Yes.

Q. And the purpose of this classification and the purpose of these rules is to prevent railroad companies from discriminating between shippers — from giving one person a cheaper rate than another, and as I take it, that is the reason this suit was brought to keep the railroad company's skirts clear from being charged with giving a lower rate purposely to any person.

A. Yes.

35 Redirect examination.

By Mr. Matthews:

Q. You don't know why your superior officers instructed the legal department to bring this suit, do you?

A. The reason they instructed them was to concur with the tariff rate.

Recross-examination.

By Mr. Fitzgerald:

Q. This receipt, Mr. Simonton, you recognize as a correct receipt?

A. Yes.

By Mr. Fitzgerald: This identified receipt is offered in evidence, marked Exhibit "B" attached hereto and made part hereof.

Redirect examination.

By Mr. Matthews:

Q. Do you know who discovered this mistake?

A. I think the mistake was discovered by the people at the other end of the line, and they took it up with our Auditor and he wrote those letters that you have.

36 Recross-examination.

By Mr. Fitzgerald:

Q. You have filed an amended bill of particulars in this case stating that this $15.00 is due the plaintiff, The Pennsylvania Railroad Company and to its connecting lines. To what connecting lines is the balance of the money due?

A. We get 12 per cent out of it and the lines West get the balance.

Q. 12 per cent, or one eighth to the Pennsylvania Company and seven-eighths to the lines West of your road, west of Chicago?

A. That is right, and when we owe the connecting lines it is up to us to collect the money.

Q. The Santa Fe Road would get how much out of this $15.00?

A. I don't know just how much their per cent would be. It connects over several lines.

Q. The Santa Fe comes as far as Omaha. Do you know the connecting lines?

A. I think the C. B. & Q., if I had the waybill I could tell you.

Q. So you cannot tell what connecting lines would get some part of this money?

A. No.

37 Q. The goods could have been shipped direct from Los Angeles to Dayton via Omaha over the Santa Fe, and from Omaha to Chicago on the C. B. & Q., and from Chicago to Dayton on the Pennsylvania Line, so there would have been two if shipped that way?

A. Yes.

Q. Do you, yourself, know whether or not there are any other rates published concerning the matters in question, Indian Curios, Indian Relics, or anything of that nature?

A. There is nothing here under Curios.

Q. Do you know, of your own knowledge, if there are any classifications or anything about Indian Relics or stones, and could you say, of your own personal knowledge, that a classification existed at the time of this shipment?

A. Yes, sir, on account of the date, May 1, 1910.

Q. Do you know whether there has been any change since that date?

A. I have no change since the present classification.

Q. Do you know what the classification was before May 1, 1910?

A. I do not.

Q. I suppose you don't undertake to carry these classifications in your head?

A. No, sir.

Q. Certain things you handle in Dayton you would be all right about?

A. I don't handle the classifications, we have other men to do that.

38 Q. Did you, yourself, or anybody connected with the railroad company, make any contract or agreement with Mr. Fink of any kind relating to this shipment?

A. No, sir.

Q. When the shipment arrived in Dayton, from an investigation of these papers, (receipt and freight bill) it was turned over to the consignee and the drayman who hauled it to his place was Ora Snyder?

A. Yes.

Q. Who received the $15.00?
A. My Clerk.
Q. He received the $15.00 and stamped the receipt with your Freight Cashier's stamp and put those initials on it, and the money was turned over to the railroad company, September 13, of what year?
A. September 13, 1910.
Q. Who is A. E. Holyfaster?
A. That is the man who took the receipt in the house. At present he is not with the company.

Thereupon the plaintiff rested its evidence, and the defendant to maintain the issues to be maintained on *its* part introduced the following evidence:

39 ALVIN J. FINK, being duly sworn, testified as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Your name is Alvin J. Fink, and you are in the Curio Business on Ludlow Street in the City of Dayton, Ohio, and were on the 13th day of September, 1910?
A. Yes, but I was at the house #604 S. Jefferson Street. I was dealing in these things while at the post-office.
Q. Briefly state to the jury what kind of a trade you entered into with this man at Los Angeles, and what you traded him for his curios.
A. Well, he wanted some old coins and I sent my old coins to the postmaster at Los Angeles as he directed.
Q. Tell why you sent them to the postmaster.
A. To protect myself.
Q. You sent the coins to the postmaster to protect yourself, to get value received from him?
A. Yes.
Q. What was he to send you for the coins?
A. A collection of Indian Relics.

40 *Exception.*

By Mr. Matthews: I object to the introduction of *of* this testimony, as it has no bearing on the situation. This contract with a third person in Los Angeles has nothing to do, in my mind, with the controversy between Mr. Fink and the Railroad Company.
Objection overruled.
Exception noted by plaintiff.

A. He was to send me a collection of Indian Relics from California that he had found, and he sent them by freight.
Q. When the goods came here to Dayton what did you do in regard to them?

A. I was to look at them, and if I was satisfied I was to release the coins.

Q. By release the coins you mean that you were to notify the postmaster to turn them over to him?

A. Yes.

Q. When the goods came here how much freight did the Railroad Company present a bill for?

A. Fifteen dollars.

Q. Did you have any knowledge at that time, or have you any knowledge now of freight classification?

A. No knowledge at all. I simply paid the bill as it came to me.

Q. Did you notify the postmaster to release the coins?

A. The postmaster released the coins, I never got them.

41 Q. Now tell the gentlemen what you did with the Indian curios?

A. They were not curios, they were Indian relics. Curios are things that are made to order, but Indian relics are things that were made by the Indians years ago and were found in the soil. Some of them were relics and some plain stones.

Q. Let me ask you how long was it before the railroad company made any claim against you for this money?

A. It was a long time, close on to a year.

Q. When this claim was made against you what position were you in in regard to this collection of Indian relics and stones?

A. I had sold part of them, what I had was not worth much. I had about a dozen in the house and they were scattered.

Cross-examination.

By Mr. Matthews:

Q. Were these goods consigned to you?

A. They were shipped to me.

Q. When did you pay the fifteen dollars?

A. On the date of the receipt.

Q. Do you know when the goods arrived in Dayton?

A. August 1910, or September 1910, I don't know just what date, but close to that time.

42 Q. You say this was a trade?

A. Yes, it was a trade.

Q. And you paid the fifteen dollars before you saw the goods?

A. Yes, the fifteen dollars in full.

Q. Suppose they were not satisfactory, you would have been out fifteen dollars, would you not?

A. Well, not exactly, if I didn't want to accept the goods I could have returned them; I would still have my coin at the other end.

Q. You would have been out your fifteen dollars?

A. Not necessarily, he was to stand the expense charges. He said he was short of money, but it was the understanding that he was to stand the expense charges.

Q. If the goods had not been satisfactory, and you had decided not to trade, and you had paid the fifteen dollars to the railroad company, how would you have gotten the fifteen dollars back?

A. I probably would have lost it—no way at all of getting it back.

Q. Then you risked the fifteen dollars?

A. I had to risk it, certainly, I risk lots of things.

Q. Where do you get your difference between curios and relics?

A. Curio is something made today, and a relic is something of the past. Curios are made to sell today and are made by Indians and white men—these are curios, but the tools and instru-
43 ments that the Indians used years ago are called relics. I would not have given ten cents for all the curios in the land. People don't want curios, they want relics. Some of them were relics and some were stone, they could have been billed as stone.

Mr. SYLVAN SIMONTON recalled:

By Mr. Matthews:

Q. Is there any distinction between Indian Relics and Indian Curios in the Tariff?

A. Not that I know of. In a case of that kind, if they had Indian curios in the box and if they had stuff that took a lower classification the whole box would have to go in the class of the higher article.

By Mr. Fitzgerald:

Q. You don't know, or don't pretend to know what was in the box?

A. I do not. I didn't examine it. It was billed out as Indian Curios.

And thereupon the defendant rested his evidence.

The foregoing is all the evidence and exhibits offered and introduced in this case by the parties thereto.

And thereupon Counsel for Plaintiff requested the Court to give to the Jury the Special Charge, before argument, as follows:

44 *Special Charge Refused.*

The freight rate to be charged by a railroad company cannot be made a matter of contract, the rate itself is fixed by law. Therefore if you find that the goods in question were received and accepted by the defendant, and also find that he has not paid the lawful amount of freight charges, your verdict should be for the plaintiff. which was refused.

Exception.

To which ruling Counsel for plaintiff excepted, and also excepted to the refusal to give said charge before argument.

Thereupon the Court proceeded to charge the Jury orally, as follows:

Charge.

1. The freight rate to be charged by a railroad company cannot be made a matter of contract, the rate itself is fixed by law. That is good law, you acknowledge that.

There is one other, a syllabus.

2. Where a railway company by reason of a mistake collects less from the consignor than the fixed rate on a shipment of goods and the goods have been delivered to the consignee, an action will lie against the consignee for the balance due, notwithstanding there was an agreement between the consignee and consignor that the consignor was to pay the freight charges.

45 *Verdict.*

And thereupon the Jury having retired for deliveration, returned again into Court, and rendered a verdict in favor of the defendant and against the plaintiff.

Exception.

To which finding the plaintiff by its Counsel excepted.

Motion for New Trial.

And thereupon, within four days, to-wit, on the 13th day of March, 1912, the plaintiff filed its motion for a new trial herein, in the words and figures following:

Before C. D. Thompson, Justice of the Peace within and for Dayton Township, Montgomery County, Ohio.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff,
vs.
ALVIN J. FINK, Defendant.

Motion for a New Trial.

Now comes the plaintiff and moves that it be granted a new trial for the following reasons:

1. That the verdict is contrary to the evidence:
2. That the verdict is contrary to law:
3. For error in refusing to give the special charge requested before argument:
4. For error in the charge of the Court; and

5. For various errors occurring at the trial.
6. Because the verdict is not sustained by sufficient evidence.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Plaintiff.

46 *Exception.*

And thereupon the Court did overrule said motion, to which ruling of the Court in refusing to grant to it a new trial herein, the plaintiff by its Counsel excepted.

And thereupon the plaintiff, on Wednesday, March 20th 1912, being the time fixed by the Court, reduced to writing these exceptions taken on the trial of this cause, and this, its bill of exceptions herein, and filed the same in this cause; and having presented the same to C. D. Thompson, Justice of the Peace, at the appointed time, to-wit, on Wednesday, March 20th, 1912, at 2 P. M., there having been no objections or amendments filed thereto, said C. D. Thompson, having upon receipt of said bill of exceptions endorsed thereon the date it was presented to him, *and* said bill of exceptions is now, within three days from the receipt thereof, by him allowed and signed, and immediately transmitted by him to the office of the Clerk of the Court of Common Pleas.

C. D. THOMPSON,
Justice of the Peace in and for Dayton Township, Montgomery County, Ohio.

47 EXHIBIT A.

Freight Receipt.

DAYTON, OHIO, 9-9, 191-.

Freight Bill No. 7261.

Consignee: Alvin J. Fink.
Destination: Jefferson St.
Route: Los Angeles.
(Point of origin to destination.)

Received of The Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., In apparent good order, the following described property:

Way-bill date and No.	Full name of shipper.	Car initials and No.
3353	W. J. W.	527,213.

Number of Packages, —.

Articles and marks.	Weight.	Rate.	Freight.	Total.
2 Bx. Indian Curios.	500	3.00	15.00	—

B/o A. E. Holyfaster.
Delivered Sept. 13-1910.
Signature, O. Sawyer.

48 EXHIBIT "B."

4-10. Form 301—1st Sheet.

Freight Bill.

A. T. S. F. Pro. 7261.
Consignee: Alvin J. Fink.
Destination: Jefferson St.
Via —.

DAYTON, OHIO, 9-9, 191-.

W. B. No. 13353.

Car No. 527213.

Date of W. B. 8-23.
Car Initials —.
Consignor: W. J. W.
Original point of Shipment: —.

To the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, Dr.

For charges on articles way-billed from Los Angeles via —.

No of pkgs.	Articles and marks.	Weight.	Rate.	Freight.
2 bx.	Indian Curios.	500	3.00	15.00

#Cks. 1 Bx. in B/O.

A. E. HOLYFASTER.

Connecting Line Reference —.
Original Way Bill Number —.
Original Car —.
Received payment,

——— ———,
Freight Cashier.

—— —, 191-.
Total to collect, 5.
Drayage —.
Original. Paid Freight Bills should accompany all claims for overcharge, Loss or Damage.
Stamped—Received Sep. 9, 1910.
Stamped Delivered Sep. 13, 1910.
Stamped: Received payment Sept. 13. S. Simonton, Freight Cashier, per —— ——.

49 THE STATE OF OHIO,
Montgomery County, ss:

I, J. Clarence Schaeffer, Clerk of the Court of Appeals within and for said County and State, do hereby certify that the foregoing is a true and correct copy of the original record of said case in said Court and of the original papers, pleadings, bill of exceptions and transcripts of docket and journal entries in said case on file in this office.

Witness, my hand and *affixed* the seal of said Court, at the City of Dayton, Ohio, this 11th day of December, A. D. 1915.

[Seal The Court of Appeals of Ohio, Montgomery County.]

J. CLARENCE SCHAEFFER,
Clerk of the Court of Appeals,
Montgomery County, Ohio.

[United States internal revenue documentary stamp, series of 1914, ten cents. Filed Dec. 11, '15. J. C. Schaeffer, Clerk.]

Endorsed on cover: File No. 25,037. Ohio, Montgomery County, Court of Appeals, Term No. 754. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error, vs. Alvin J. Fink. Filed December 13th, 1915. File No. 25,037.